STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID ROSS AMES,

Defendant-Appellant.
_____/

Supreme Court No. 156077

Court of Appeals No. 337848

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AMICUS CURIAE **BRIEF OF THE CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN**

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STATEMENT OF INTEREST

Since its founding in 1976, Criminal Defense Attorneys of Michigan ("CDAM") has been the statewide association of criminal defense lawyers in Michigan, representing the interests of the criminal defense bar in a wide array of matters. CDAM has more than 400 members.

As reflected in its bylaws, CDAM exists in part to "promote expertise in the area of criminal law, constitutional law and procedure and to improve trial, administrative and appellate advocacy," "provide superior training for persons engaged in criminal defense," "educate the bench, bar and public of the need for quality and integrity in defense services and representation," and "guard against erosion of the rights and privileges guaranteed by the United States and Michigan Constitutions and laws."

This appeal implicates such guaranteed rights. *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), held that mandatory sentencing guidelines violate a defendant's Sixth Amendment rights and struck down all provisions inconsistent with its holding. The Court's opinion in *People v Steanhouse*, 500 Mich 453; 902 NW2d 327 (2017), then reaffirmed a defendant's fundamental right to a proportional sentence, shifting the focus to "whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines' recommended range." *Id.* at 472 (quoting *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990)).

The Court is now faced with the question of whether an appendage of the mandatory sentencing guidelines scheme—the elimination of appellate review for within-guidelines sentences—should remain intact despite the sentencing structure around it having been fundamentally transformed. It should not. CDAM advocates an approach consistent with this Court's prior holdings: strike down the first sentence of § 34(10) as a casualty of *Lockridge*.

STATEMENT OF QUESTION PRESENTED

As part of Michigan's former mandatory sentencing scheme, MCL 769.34(10) eliminated appellate review of sentences within the mandatory guidelines. But *Lockridge* and *Steanhouse* held that the mandatory sentencing guidelines are unconstitutional, restored the trial court's discretion to impose a proportional sentence, and confirmed that a trial court's proportionality determination was subject to abuse-of-discretion review. Should the first sentence of § 34(10)—which prohibits proportionality review of a within-guidelines sentence—survive these holdings?

Trial court answered: Yes

Court of Appeals' majority answered: Denied leave to appeal

Appellant answers: No

Appellee answers: Yes

Amicus Curiae PAAM answers: Yes

Amicus Curiae CDAM answers: No

INTRODUCTION

In *Lockridge*, this Court held that Michigan's mandatory sentencing guidelines violated the Sixth Amendment. To cure this constitutional violation, the Court rendered the sentencing guidelines entirely advisory. Under this remedy, sentencing courts are no longer tethered to the sentencing guidelines, but rather tasked to impose a sentence *proportional* to the crime—whether it be a sentence within or outside of the sentencing guidelines. This case concerns the extent to which *Lockridge*'s remedy encompasses a related provision of the same statute, namely, the first sentence of MCL 769.34(10), which prohibits appellate review of within-guidelines sentences for proportionality. The Court should hold that this provision did not survive the mandatory-to-advisory shift for two reasons.

First, as the United States Supreme Court recognized in *United States v Booker*, 543 US 220 (2005), prohibiting appellate review of within-guidelines sentences places a heavy thumb on the sentencing scales by strongly incentivizing sentencing courts to hand down within-guidelines sentences. Preserving this component of the mandatory guidelines system would ultimately undermine the *Lockridge* remedy of making the guidelines advisory. If the sentencing guidelines are to be truly advisory, they must be advisory in all courts, and this means freeing not only the trial courts but also the appellate courts from the guidelines' constraints.

Second, preserving § 34(10) would be inconsistent with the Legislature's "preference for equal treatment" of all cases. *Lockridge*, 498 Mich at 390. Under the Legislature's scheme, the guidelines were mandatory in all cases. This Court reasoned in *Lockridge* that this preference counseled against making the guidelines advisory in some cases (downward departures) but mandatory in others (e.g., upward departures). If § 34(10) remains in force, the guidelines will

still be enforced in appeals where the sentence is within the guidelines, and not in appeals where the sentence is outside of the guidelines, contrary to this preference for equal treatment.

BACKGROUND

As this Court recognized in *Steanhouse,* appellate review always involves applying at least two legal standards: (1) the rule of decision—i.e., the substantive legal principle governing the trial court's decision—and (2) the "standard of review," which dictates the level of deference (if any) given to the trial court's decision. 500 Mich at 471. The mandatory sentencing guidelines had a profound effect on both the rule of decision and standard of review in Michigan sentencing cases.

Prior to the Legislature's decision to make the sentencing guidelines mandatory, the rule of decision in sentencing cases was the proportionality principle articulated in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990): punishment must be proportional to the offense and the offender. This was to be applied in the first instance by the trial court; it was not an appellate review standard. The standard of appellate review was "abuse of discretion," which meant examining whether the trial court's decision fell within the range of "reasonable and principled outcomes." See *People v Babcock*, 469 Mich 247, 264-268; 666 NW2d 231 (2003).

The mandatory sentencing scheme installed in the 1990s changed this structure. Under the new statutory scheme, the rule of decision still involved a proportionality consideration, but the trial court's ability to hand down a proportional sentence was entirely constrained by the sentencing guidelines absent "substantial and compelling" reasons for departure. See MCL 769.34(2). The same 1994 statute also dictated the standard of review. 1994 PA 445. If the trial court stayed within the mandatory guidelines and followed the proper procedures in applying them, appellate review was barred entirely. MCL 769.34(10). If the trial court departed from the

mandatory guidelines, the standard of review was dictated by *Babcock*, and appellate courts would review for an abuse of discretion the trial court's conclusion that there were substantial and compelling reasons to depart from the guidelines. *Babcock*, 469 Mich at 264-270.[1]

The structure changed once again with this Court's decision in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015). In *Lockridge*, this Court held that the portions of MCL 769.34 that made the Michigan sentencing guidelines mandatory were unconstitutional. The Court's remedy was to make every aspect of the sentencing guidelines purely advisory, closely following the path carved by the United States Supreme Court in *Apprendi v New Jersey*, 530 US 466 (2000), *Alleyne v United States*, 570 US 99 (2013), and *United States v Booker*, 543 US 220 (2005). *Lockridge*, 498 Mich at 365. In this vein, this Court said that "[t]o the extent that any part of MCL 769.34 or another statute refers to use of the sentencing guidelines as mandatory or refers to departures from the guidelines, that part or statute is also severed or struck down as necessary." 498 Mich at 365 n 1. This footnote created some questions regarding exactly which parts of the mandatory sentencing scheme were affected by the mandatory-to-advisory shift.

Lockridge also left open the question of what rule of decision courts should use—should sentencing courts revert back to the *Milbourn* principle of proportionality or did *Lockridge* intend to incorporate the federal sentencing factors under 18 USC 3553(a)? The Court answered this question in *People v Steanhouse*, 500 Mich 453; 902 NW2d 327 (2017), favoring the former approach, and holding that the rule of decision for sentencing courts is always the principle of proportionality. *Id.* at 461. The Court relied on the fact that *Milbourn*'s "principle of

[1] PAAM confuses the difference between rule of decision and standard of review. PAAM asserts that pre-*Lockridge* the *review standard* was "substantial and compelling." (PAAM Br 9.) Not so. This Court went to great extent in *Babcock* to explain that the proper standard of review is abuse of discretion—"substantial and compelling" was the rule of decision. See 469 Mich at 264-270.

proportionality has a lengthy jurisprudential history in this state," and concluded that *Lockridge* provided no compelling reason to depart from that history:

> [N]othing else in [*Lockridge*] indicated we were jettisoning any of our previous sentencing jurisprudence outside the Sixth Amendment context. Moreover, none of the constitutional principles announced in *Booker* or its progeny compels us to depart from our longstanding practices applicable to sentencing. Since we need not reconstruct the house, we reaffirm the proportionality principle adopted in *Milbourn* and reaffirmed in *Babcock* and *Smith*. [*Id.* at 473.]

Steanhouse also noted that "the standard of review to be applied by appellate courts reviewing a sentence for reasonableness on appeal is abuse of discretion." *Id.* at 471. But since that case concerned a sentence outside the sentencing guidelines, the Court left for another day whether this standard of review also applies when the trial court sentences a defendant within the advisory guidelines. See *id.* at 471 n 14. This question places the spotlight on the first sentence of § 34(10):

> If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence.

The question now before the Court is whether this vestige of the mandatory guidelines survived *Lockridge*.

ARGUMENT

I. Section 34(10) is incompatible with the advisory sentencing guidelines scheme this Court adopted in *Lockridge*.

To answer the question presented, the Court need not look any further than the federal authorities it relied upon in *Lockridge*, which make clear that an advisory sentencing guidelines scheme only remedies a Sixth Amendment sentencing problem if a sentencing court is *truly* free

to impose a sentence outside of the sentencing guidelines range. As the United States Supreme Court has explained, that freedom depends in part on the scope and nature of appellate review.

The relationship between sentencing discretion and appellate review was on full display in *United States v Booker*, 543 US 220 (2005), which struck down the mandatory nature of the federal sentencing guidelines and served as the roadmap for this Court's decision in *Lockridge*. In *Booker*, the Court found it necessary to excise two federal statutes in order to render the guidelines advisory and cure the Sixth Amendment problem. *Id*. at 259. The first, 18 USC 3553(b)(1), is typically referred to as the "mandatory provision," as it provided that trial courts "shall" sentence within the guidelines in the absence of certain circumstances. *Id*.

But the second, 18 USC 3742(e), was "a different, appeals-related section . . . which set[] forth standards of review on appeal"—including a de novo standard for departures from the guidelines, which Congress had adopted in 2003. *Id*. at 260. The *Booker* majority found that this de novo standard served "to make Guidelines sentencing even more mandatory than it had been" by subjecting within-guideline sentences to less appellate scrutiny than non-guideline sentences (which were allowed even before *Booker* in limited circumstances). *Id*. at 261. Justice Stevens similarly argued that § 3742(e) was a large part of what made the guidelines mandatory; it "g[a]ve[] § 3553(b)(1) teeth by instructing judges that any sentence outside of the Guidelines range without adequate explanation will be overturned on appeal." *Id*. at 294-295 (Stevens, J, concurring). *Booker* made clear that whether a guidelines scheme is mandatory may depend to some extent on the level of appellate scrutiny devoted to trial court sentencing decisions.

The issue arose again in *Rita v United States*, 551 US 338, 341 (2007), where the Court resolved a circuit split regarding whether it was appropriate for appellate courts to afford a presumption of reasonableness to sentences falling within the federal sentencing guidelines range.

The Court determined that it was, but emphasized two critical facts in defense of its holding: first, that "the presumption is not binding," *id*. at 347, and second, that "the presumption . . . is an *appellate* court presumption," *id*. at 351. Concurring in this result, Justice Stevens stressed "the Court['s] acknowledge[ment]" that "*presumptively* reasonable does not mean *always* reasonable," and that "the presumption, of course, must be genuinely rebuttable." *Id*. at 366-367 (Stevens, J, concurring).

In dissent, Justice Souter argued that even a rebuttable appellate presumption was too weighty an influence on trial court sentencing decisions to comport with the Sixth Amendment remedy adopted in *Booker*. "What works on appeal determines what works at trial," and "a trial judge will find it far easier to make the appropriate findings and sentence within the appropriate Guideline, than to go through the unorthodox factfinding necessary to justify a sentence outside the Guidelines range . . . ." *Id*. at 391 (Souter, J, dissenting). Justice Souter would have rejected the appellate presumption of reasonableness, "not because it is pernicious in and of itself, but because I do not think we can recognize such a presumption and still retain the full effect of *Apprendi* in aid of the Sixth Amendment guarantee." *Id*.

Further emphasizing why there must be at least *some* level of appellate review, the Court in *Rita* portended the very issue at stake here—that trial court judges can make mistakes applying the *Booker* standard, even when imposing within-guideline sentences:

> In sentencing, as in other areas, district judges at times make mistakes that are substantive. At times, they will impose sentences that are unreasonable. . . . *Booker* held unconstitutional that portion of the Guidelines that made them mandatory. It also recognized that when district courts impose discretionary sentences, *which are reviewed under normal appellate principles by courts of appeals*, such a sentencing scheme will ordinarily raise no Sixth Amendment concern. [*Rita*, 551 US at 354 (citation omitted) (emphasis added).]

Just as appellate review is an essential component of the Sixth Amendment remedy adopted in *Booker* and its progeny, it is equally essential to the same remedy adopted by this

Court in *Lockridge* and *Steanhouse*. Indeed, *Rita*'s observation that a within-guidelines sentence can be unreasonable mirrors an observation made by this Court in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), that "even a sentence within the sentencing guidelines" can violate the principle of proportionality and thus "be an abuse of discretion." *Id.* at 661. *Rita*'s and *Milbourn*'s observations underscore the crucial role of appellate review in advisory sentencing guideline schemes. In the federal system, this review has not proven to be a hollow exercise. See, e.g., *United States v Jenkins*, 854 F3d 181, 196 (CA 2, 2017) (within-guideline sentence not reasonable). There is no reason to doubt that such appellate review would prove similarly meaningful for Michigan's sentencing scheme.

The prosecution overlooks these observations, instead focusing only on the precise constitutional concern in *Lockridge*: "[T]o the extent that § 34(10) might be seen to raise the ceiling of available punishments, it is not a ceiling of constitutional magnitude." (Prosecution Br 9.)[2] In other words, because § 34(10) does not require *trial courts* to adhere to any greater mandatory minimum, the Sixth Amendment is not implicated, and the statute should survive. But the trial court's freedom to impose a sentence within or outside of the guidelines depends on more than restoring a non-guidelines-based rule of decision (proportionality); it also depends on restoring a non-guidelines-based appellate review standard. See *Booker*, 543 US at 261; *Rita*, 551 US at 347. The prosecution seems to miss this point, despite it being so "pellucidly" clear to the Supreme Court. *Gall v United States*, 552 US 38, 46 (2007). See also *id.* at 51 ("Regardless

[2] The prosecution and PAAM take different, but equally misguided routes responding to the question presented. The prosecution focuses narrowly on the Sixth Amendment violation discussed in *Lockridge*, arguing that because that exact same concern is not at issue with respect to § 34(10), it does not need to be struck down. PAAM, on the other hand, focuses entirely on the explicit language of *Lockridge*, also concluding that because it did not explicitly strike down § 34(10), the statute must stand.

of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard.").

Appellate review matters not because it directly expands or contracts the range of outcomes available to the sentencing court, but because it has enormous influence on the sentencing court's decisions within the available range. For instance, while a sentencing court (as opposed to an appellate court) is forbidden from presuming that a within-guideline sentence is proportional, see *Rita*, 551 US at 351; *Gall*, 552 US at 50, § 34(10) virtually guarantees such a presumption by ensuring that as a matter of *fact*, no within-guideline sentence will ever be disproportionate—or, more precisely, will ever be *found* disproportionate on review.

Given that the outcome of *Rita* depended upon the appellate presumption of reasonableness for within-guideline sentences being "genuinely rebuttable"—as the majority acknowledged and Justice Stevens underscored—it is unclear how the first sentence of § 34(10) could pass constitutional muster. This provision serves the same function as 18 USC 3742(e) of giving teeth to mandatory scheme that this Court struck down in *Lockridge*. See, e.g., *People v Babcock*, 469 Mich 247, 268; 666 NW2d 231 (2003) (describing § 34(10) as part of the "structure and content of the sentencing guidelines" that balanced the trial court's discretion in light of the mandatory guidelines). It should suffer the same fate as § 3742(e).

The prosecution resists this conclusion by characterizing the ban on appellate review not as "a presumption" but rather as the "remov[al of] a class of claims from the jurisdiction of the Court of Appeals," which the prosecution calls "the most important distinction" between this case and *Rita*. (Prosecution Br 9.) This argument is ironic, given that this characteristic is precisely what makes § 34(10) incompatible with the advisory guideline remedy adopted in *Lockridge*. In truth, there is no logical difference between stripping appellate courts of

jurisdiction to review the proportionality of within-guideline sentences and imposing an *unrebuttable* presumption of reasonableness for within-guideline sentences. Both approaches have the same effect, which is to insulate disproportionate sentences from appellate review and place a heavy thumb on the sentencing scales in the trial courts.

Whether viewed as stripping appellate jurisdiction or imposing an unrebuttable appellate presumption, § 34(10) is antithetical with the remedy that this Court adopted in *Lockridge*.[3] Unless this Court is prepared to turn back on its observation in *Milbourn* that sentencing courts are capable of issuing disproportionate sentences even within the sentencing guidelines, preserving § 34(10) means allowing such disproportionate sentences to stand uncorrected. This would undermine the advisory scheme and thereby defeat the Court's Sixth Amendment remedy in *Lockridge*. The Court should declare the first sentence of § 34(10) invalid under *Lockridge*.

II. Enforcing § 34(10) would make the guidelines mandatory in some appeals but not others, contrary to the Legislative preference to treat all cases equally.

Once this Court determined that Michigan's mandatory sentencing guidelines violated the Sixth Amendment, the Court considered three alternative remedies: (1) requiring juries to find facts capable of scoring every offense variable; (2) rendering only the guideline range "floor" advisory; or (3) rendering all aspects of the guidelines advisory. *Lockridge*, 498 Mich at 389-391. After dismissing the first option as "burden[some]" and "profound[ly] disruptive," the Court selected the third option, which it described as "*Booker*-iz[ing]" Michigan's sentencing guidelines because it was the same remedy chosen by the United States Supreme Court in

[3] The same is true of MCL 769.34(7), which only requires the trial court to advise of defendant of his rights to challenge a minimum sentence that exceeds the guidelines sentencing range. This vestige of the mandatory system is inconsistent with the notion that the guidelines are now advisory and the notion that a within-guidelines sentence can be disproportionate.

Booker. *Lockridge*, 498 Mich at 391. Instructive here is the Court's reason for favoring *Booker*'s remedy over the second option.

Lockridge acknowledged that making only the bottom of the guidelines range advisory was a "less disruptive remedy that is fairly closely tailored to the constitutional violation." *Id.* at 390. But it ultimately favored the broader remedy due to the Court's understanding of the original legislative intent behind MCL 769.34. The Court observed that the "Legislature wanted the applicable guidelines minimum sentence range to be mandatory in all cases." *Id.* Since that would no longer be the case, the Court found that only removing one mandatory aspect of the guidelines would be "inconsistent with the Legislature's expressed preference for equal treatment." *Id.*

To explain its reasoning, the Court quoted *Booker*'s warning against trying to predict what the Legislature would have done had it known that the statutory scheme would eventually undergo "fundamental change":

> In today's context—a highly complex statute, interrelated provisions, and a constitutional requirement that creates fundamental change—*we cannot assume that Congress, if faced with the statute's invalidity in key applications, would have preferred to apply the statute in as many other instances as possible*. [*Id.* at 390 (quoting *Booker*, 543 US at 248) (emphasis in original).]

Booker's warning remains just as valid here. Section 34(10) was passed in 1994 as part of the same law that created MCL 769.31 through MCL 769.34. 1994 PA 445. The law established the Sentencing Commission with directions to develop mandatory sentencing guidelines and provided the first versions of §§ 34(2) and 34(3) that were eventually struck down in *Lockridge*. *Id.* It is thus no stretch to say that § 34(10) was passed with the same overall purpose that "the applicable guidelines minimum sentence range . . . be mandatory in all cases," and the same legislative "preference for equal treatment." 498 Mich at 390.

As it did in *Lockridge*, the Court should recognize that § 34(10)'s overall purpose has been eliminated. For a sentencing judge, the guidelines are now subordinate to the principle of proportionality: "[T]he key test is whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines' recommended range." *Steanhouse*, 500 Mich at 475 (quoting *Lockridge*, 498 Mich at 391; *Milbourn*, 435 Mich at 661). And under this rule, an error can occur even when sentencing a defendant within the sentencing guidelines. See *Milbourn*, 435 Mich at 661. Enforcing § 34(10), however, would mean the guidelines remain a mandatory constraint on appellate review in some appeals. If § 34(10) were kept in place, defendants with disproportionate sentences *outside* the guidelines could seek full appellate review unhampered by and untethered to the guidelines. Those given disproportionate sentences *within* the guidelines would be limited to review for scoring and factual errors under the guidelines. This thwarts the legislative "preference for equal treatment" of all cases that so concerned the Court in *Lockridge*. 498 Mich at 390.

Preserving § 34(10) would also undermine the Legislature's apparent preference for applying the same rule of decision below and on appeal. Under the Legislature's system, the guidelines serves as the principal rule of decision above and below. If § 34(10) remains in force despite *Lockridge*, proportionality would be the only rule of decision for trial court sentencing, but the guidelines would be the rule of decision in some sentencing appeals. Consequently, even a blatant disregard the rule of proportionality could not be corrected on appeal if the sentence happens to fall within the guidelines. It cannot be presumed this is what the Legislature would have intended if it had known the guidelines would be advisory in the trial courts.

The Prosecution and PAAM attempt to frame this case as a separation of powers issue, insisting that the Legislature has the power to limit the standard of review and arguing that

§ 34(10) is "simply a form of jurisdiction-stripping statute" (PAAM Br 12) "within the Legislature's legitimate constitutional power" (Prosecution Br 9). Had § 34(10) been passed post-*Lockridge*, this would be a relevant consideration. But that is not the case. Rather, § 34(10) was a part of the very statutory scheme invalidated in *Lockridge*, and there is no indication that the Legislature ever intended that it operate outside that scheme.[4] The prosecution and PAAM would have the Court ignore *Booker*'s warning that the Legislature would not presumably leave some elements of the sentencing scheme in place without others. The Court refused to assume as much in *Lockridge*, and should avoid such an assumption here. To truly *Booker*-ize Michigan's sentencing guidelines,[5] the Court must strike down the first sentence of § 34(10).

CONCLUSION AND REQUESTED RELIEF

The first sentence of § 34(10) is antithetical to the entire idea of an advisory guidelines scheme. Immunizing within-guidelines sentences from proportionality review has the effect of strongly incentivizing sentencing courts to stay within the guidelines, as if the scheme were still mandatory policy. Section 34(10) is also inconsistent with the Legislature's preference for giving the guidelines equal treatment in all cases and for both trial and appellate courts to be governed by the same rule of decision for sentencing. To resolve these issues, the Court should

[4] Indeed, this and other courts have acknowledged that § 34(10) was meant to play a specific role *within the mandatory sentencing scheme*. See, e.g., *People v Babcock*, 469 Mich 247, 268; 666 NW2d 231 (2003) (describing § 34(10) as part of the "structure and content of the sentencing guidelines" that balanced the trial court's discretion in light of the mandatory guidelines); *People v Garza*, 469 Mich 431, 434-435; 670 NW2d 662 (2003) (describing § 34(10) as "part of" "comprehensive sentencing reform" contained elsewhere in § 34); *People v Payne*, No. 232863, 2003 WL 21186606, at *2 (Mich Ct App, May 20, 2003) (describing § 34(10) as "merely limit[ing] the circumstances in which a defendant can challenge a sentence that adheres to legislatively prescribed requirements").

[5] *Lockridge* certainly expressed a preference for following the Supreme Court's guidance in this area, as its first defense of its chosen Sixth Amendment remedy was to point out that "it is the same remedy adopted by the United States Supreme Court in *Booker*." 498 Mich at 391.

accept *Lockridge*'s invitation to strike down the first sentence of § 34(10) as a natural casualty of the advisory guidelines scheme.

Respectfully submitted,

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